Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
	)	
Implementation of Section 254 (g) of the Communications Act of 1934, as amended	)	

COMMENTS OF SPRINT
ON PETITIONS FOR RECONSIDERATION

Sprint Communications Company, L.P. ("Sprint") respectfully submits its comments on the Petitions for Reconsideration filed on September 16, 1996 in the above-captioned proceeding.[1] Sprint supports the Petition for Reconsideration of AT&T Corp. ("AT&T"), portions of the Petition for Reconsideration of IT&E Overseas, Inc. ("IT&E"), and largely opposes the Petition for Reconsideration of the State of Hawaii ("State").

SUMMARY

AT&T has demonstrated with clear and convincing factual evidence that actual competition from regional carriers requires that larger interexchange carriers have greater flexibility to conduct promotions and to de-average their

[1] *See* 61 F.R. 51941 (October 4, 1996).

rates than the Commission has permitted. Failure to do so would inhibit competition.

Sprint also disagrees with the State's attempt to have the Commission "clarify" its rulings to date in this proceeding in such a manner as to reverse the Commission's holdings. Moreover, the State's argument that the Commission may not forbear from requiring rate integration is not supported by applicable Commission precedent.

Finally, Sprint supports IT&E's petition to the extent that it requests that the Commission continue its oversight of the rate integration process with respect to Guam and the Commonwealth of the Northern Marianas. Sprint also requests that the Commission entertain temporary waivers of its rules to the extent that adequate facilities at reasonable prices do not become available between Guam and the Commonwealth prior to the deadline for rate integration.

I. *AT&T's Petition for Reconsideration*

AT&T pointed out in its Petition for Reconsideration that the Commission had specifically declined to establish an exception to its general rate averaging rule based on the existence of competing regional carriers that may be able to offer lower rates for interexchange services because of lower access charges or other costs even though the

Commission has the power to forbear from such a requirement.[2]

The Commission refused to forbear because the commenters, including Sprint, assertedly based their claims on the need for forbearance "entirely on generalized assertions," Report and Order at para. 38. In its Petition for Reconsideration, however, AT&T has provided clear, concrete and convincing evidence of the need for such forbearance. AT&T observed that an affiliate of the Southern New England Telegraph Company (SNET), located in the State of Connecticut, has aggressively entered the interexchange market, offering "one stop shopping" for local, toll, and cellular communications.[3]

AT&T further pointed out that SNET had successfully convinced over 260,000 residential customers to switch from AT&T's service to SNET in only five months. AT&T stated it had attempted to blunt SNET's success by offering long term promotional discounts in SNET's area. SNET's response was to file a formal complaint against AT&T alleging that the latter's promotional efforts violated the Commission's rate averaging requirements.[4]

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[2] AT&T Petition for Reconsideration at 2, citing the Commission's Report and Order in CC Docket No. 96-61, FCC 96-331, released August 7, 1996 ("Report and Order") at para. 38.

[3] *Id.* at 3-4.

[4] *Id.*

In Sprint's view, it would be difficult to find a more dramatic illustration of how the Commission's refusal to forbear damages competition and impedes the public interest. In its Notice of Proposed Rulemaking ("NPRM") in this docket,[5] the Commission acknowledged that there may be circumstances where it would be inappropriate to treat interexchange services as a national market. In particular, the Commission noted that the BOCs' control of access facilities in their local service regions might require it to examine those regions individually in determining whether the BOCs have market power.[6]

It is elementary economics that a market is defined as a group of products or services and a geographic area in which this group is sold, such that there is substitutability in supply or in demand between the products or services in the group. With respect to defining a geographic market, the Supreme Court has held that for purposes of the antitrust laws,

> Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both "correspond to the commercial realities" of the industry and be economically significant.

Brown Shoe Co. v. *United States*, 370 U.S. 294, 336 (1962) (fn. omitted).[7]

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[5] FCC 96-123, released March 25, 1996.

[6] *Id.* at para. 53.

[7] In the NPRM, the Commission tentatively concluded that it should follow the approach taken in the 1992 U.S. Department of Justice/Federal

As the Commission noted in para. 48 of the NPRM, the 1992 Merger Guidelines define the relevant geographic market as the "region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere."

According to SNET's March 20, 1996 SEC Form 10-K at pages 3-4, it has undertaken a number of initiatives "in response to other competitors' efforts." One of these initiatives has been to offer its Connecticut customers SNET All Distance, a "seamless toll service product line which includes a discount structure that combines intrastate, interstate and international calling." *Id.*

SNET offers SNET All Distance only from Connecticut, where it is an incumbent local exchange carrier.[8] That geographic area is therefore both a "commercial reality" and "economically significant," and qualifies as a geographic

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Trade Commission Merger Guidelines, 4 Trade Reg. Rep. (CCH) para. 13,104, at p. 20,569 ("1992 Merger Guidelines"), to define relevant markets. NPRM at para. 41.

[8] SNET is, for all practical purposes, the incumbent LEC for the entire State of Connecticut. Sprint understands that the New York Telephone Company has one exchange in Connecticut while the Woodbury Telephone Company has three exchanges. All other exchanges are SNET's.

market under the 1992 Merger Guidelines as well.[9] AT&T's loss of over 260,000 customers to SNET certainly demonstrates substitutability between AT&T's and SNET's interexchange offerings. It is therefore difficult to see how the Commission could avoid concluding that Connecticut is a relevant geographic market.[10]

If Connecticut is a geographic market, then free competition within that market demands that interexchange carriers have the freedom to price as they see fit, particularly to meet interexchange competition from the incumbent LEC. It is a perversion of the overarching goals of the Telecommunications Act of 1996 to utilize the provisions of Section 254(g) of that Act to thwart such competition.

Sprint anticipates that at least some of the regional Bell Operating Companies will adopt the same strategy as SNET when the former enter the interexchange business from within their regions.[11] Sprint agrees with AT&T's argument

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[9] If SNET were the only telephone company in the State of Connecticut, there is little doubt that it could impose such a price increase for interexchange service. For the vast majority of Connecticut subscribers, it would be unfeasible and impractical to make the same telephone call from Massachusetts or New York to avoid a price increase in Connecticut. Common sense and the 1992 Merger Guidelines lead to the same result: Connecticut is a relevant geographic market for interexchange service.

[10] In its comments in CC Docket No. 96-61, Sprint, echoing the Commission's observation, noted the "glaringly apparent" need to examine an RBOC's market power in-region as opposed to out-of-region. Sprint comments in CC Docket No. 96-61 at 6.

that unlike the larger interexchange carriers, who operate on a nationwide or near-nationwide basis, the new regional entrants, faced with no rate averaging constraints under the Commission's rules, will likely be free to price their services based solely upon market needs of their specific areas. The new entrants will likely be able to reflect only a single incumbent LEC's access rates, often the rates of their own affiliate.[12] The larger interexchange carriers, shackled by the rate averaging rules, will be unable to formulate a competitive response.[13]

Sprint therefore joins AT&T in urging the Commission to forbear from rate averaging requirements where national carriers must compete in identifiable geographic markets against interexchange carriers who choose to offer service only in those markets.[14] Rather than providing generalized

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[11] AT&T's Petition at 5 points out that some non-RBOC incumbent LECs besides SNET have already begun to provide a full range of telecommunications services to their "home town" customers.

[12] Sprint also notes that because larger incumbent LECs file their own interstate access tariffs, the costs incurred by an interexchange carrier to serve particular regional markets can vary substantially. To the extent that the Commission will not permit the rates charged by larger interexchange carriers to reflect the costs incurred in particular regional markets, the Commission inhibits the ability of those carriers to compete.

[13] Sprint previously argued in its comments in this docket and here reiterates that if the Commission requires a carrier providing geographically rate averaged service to maintain such a rate structure in the face of competition, the Commission would essentially be denying the carrier an opportunity to compete on an evenhanded basis and to earn a return on its investment. Such a policy would introduce a systematic bias that would operate over the long run to depress the earnings of carriers with geographically averaged rates. A similar bias was found unlawful in AT&T v. FCC, 836 F.2d 1386 (D.C. Cir. 1988).

assertions, Sprint believes that AT&T has provided hard evidence that such forbearance is required. Any other course would turn a blind eye to competitive realities.

II. *The State of Hawaii's Petition for Reconsideration*

The State contends that rate integration, one type of geographic averaging, has never been a discretionary Commission policy and that it is a national, statutory policy borne out of Section 202(a) of the Act.[15] The State further argues that because any deviation from rate integration is unjustly or unreasonably discriminatory, the Commission has no authority to forbear from rate integration.

Sprint finds the State's statutory interpretation improbable. Section 202(a) only forbids unjust or unreasonable discrimination or preference. Section 202(a) has been part of the Communications Act since its original enactment in 1934. Rate integration did not occur until the 1970's, and then only pursuant to Commission order.[16] It is unlikely that the rates to Hawaii and other offshore points were blatantly illegal for some forty years prior to the

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[14] Sprint also concurs with AT&T's observation that, in order to compete with SNET's (or others') permanent rates and rate structures, it is necessary to have promotional discounts that run longer than the 90 days contemplated by the Commission in its Report and Order.

[15] Section 202(a) provides, in part, that "It shall be unlawful for any common carrier ... to make or give any undue or unreasonable preference ... to any ... locality, or to subject any ... locality to any undue or unreasonable prejudice or disadvantage."

[16] *See, e.g.*, Integration of Rates and Services, 61 FCC 2d 380 (1976).

Commission's rate integration orders because those rates were not integrated into the rate structures for similar service on the U.S. Mainland.

In fact, the history of the Communications Act confirms the error of the State's position. As the Commission recognized in *Telegraph Service with Hawaii*, 28 FCC 599, 603 (1960), *recon. den.* 29 FCC 716 (1960), original Section 222 of the Communications Act, now repealed, defined telegraph service between the U.S. Mainland and Hawaii, Puerto Rico, the Virgin Islands, or any other U.S. possession, as an international telegraph operation.

In *Telegraph Service with Hawaii*, the Commission held that under former Section 222, the Western Union Telegraph Company could not provide telegraph service to Hawaii as part of Western Union's domestic operations even after Hawaii became a State: under Section 222, Hawaii was a foreign point from which Western Union was statutorily barred. 28 FCC at 605.

More importantly, the Commission also denied Western Union's request that the Commission recommend to Congress that former Section 222 be amended to permit Western Union to serve Hawaii. Western Union argued that it would afford Hawaii the higher levels of service available to U.S. Mainland customers at rates no higher than, and in many

respects lower, than those applied by the carriers presently serving Hawaii.

As the Commission put it,

> "In essence, the position taken by Western Union appears to be that Hawaii, since it is now a State, should receive telegraph message service based on the same domestic pattern as is applicable to the States on the mainland rather than a message service based on the pattern which it now receives." *Id.* at 611.

The Commission, however, refused to make such a recommendation both in its original decision and upon a request for reconsideration on this point. If the State were correct in its view that "rate integration is a necessary corollary of Section 202(a)," the *Telegraph Service with Hawaii* case, which has never been overruled, was wrongly decided.

That the Commission later (and unsuccessfully) attempted to change its mind and allow Western Union into the Mainland-Hawaii record service market for the provision of Mailgram service suggests strongly that rate integration is an administrative creation from which the Commission may forbear even after passage of the Telecommunications Act of 1996, and not a statutory mandate. *See Western Union Telegraph Company*, 55 FCC 2d 668 (1975), *rev'd sub nom. Western Union International, Inc.* v. *FCC*, 544 F.2d 87 (2d Cir.), *cert. den.* 434 U.S. 903 (1977).[17]

[17] In its decision, the Commission, noting the rapid growth of Mailgram service on the U.S. Mainland, said "We believe that the people of Hawaii are entitled to the benefits of this [Mailgram] service, and should not

Sprint also disagrees with the State's contention that "clarification" by the Commission is necessary to require that if a carrier's promotional discount, custom tariff, Tariff 12 offering, optional calling plan or private line service employs one structure for Mainland traffic, then the carrier must employ the same rate structure for offshore points. As AT&T has demonstrated, larger interexchange carriers already face actual competition from regional carriers in identifiable regional markets.

The State's "clarification" presumably would require AT&T or Sprint to offer the same rate plans in Hawaii or Puerto Rico as they did in Connecticut to meet competition from SNET's All Distance offering notwithstanding that it made little economic and competitive sense to do so.

As the Commission knows, the Hawaiian Telephone Company (HTC) already competes in the provision of interexchange service from Hawaii against Sprint, AT&T, and others. The Puerto Rico Telephone Company (PRTC) currently has pending before the Commission an application (File No. I-T-C 96-214) to provide international service from Puerto Rico. Sprint cannot see how the Commission's pro-competitive goals would be furthered by requiring Sprint to offer the same rate plans in Hawaii or Puerto Rico that were formulated to meet

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be deprived of the opportunity to have it provided by WU, in the event that we should determine that WU's proposal is superior to other pending applications." 55 FCC 2d at 672.

competition in Connecticut. This would be akin to requiring lettuce to be sold at the same price in Montana in mid-Winter as it is sold in a vegetable stand located next to a farm in Florida.

The State's "clarification" would also raise difficult and vexing regulatory issues that are much better resolved by the marketplace. If Sprint, for example, sought to respond to a new rate plan or promotion by HTC in Hawaii for international service to the Philippines, where many Hawaii residents have friends or relatives, would it have to make the same rate plan available in Connecticut, which has very different demographics than Hawaii? The State's "clarification" is unneeded and would impede full and free competition.

The State also argues that where a contract tariff contains deaveraged rates, rate integration would require the carrier to use the same rate structure within that tariff for the provision of services to and from offshore points as it would use in calculating charges for services within the continental U.S. In the State's view, a contract which offered postalized rates for the continental U.S. but distance-sensitive rates for offshore points would constitute an impermissible end run around the alleged statutory prohibitions against such discrimination.[18]

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[18] State Petition at 5.

The State's assertions, however, would, if adopted, interfere with customer choice and freedom. Assume that service to Hawaii was important to a particular customer seeking a particular network configuration to serve its special needs under a contract tariff. That customer would likely include Hawaii in the contract's general pricing method, such as a postalized rate, along with all other points the customer wished to include in its network configuration.

If the customer did little or no business in Hawaii, the customer would not want to include Hawaii within its network under the postalized pricing of that customer's contract. Any efforts by Sprint to add Hawaii (or any other point, for that matter) to this configuration would likely be viewed as an effort to get the customer to pay for something it neither needed nor wanted.

Even if the customer did have a business need to communicate with Hawaii, it should be for the customer to decide whether those needs would be better met by excluding Hawaii from its network and making calls to and from Hawaii via distance-sensitive, general tariff offerings even if the latter are more expensive. The Commission should not dictate how a customer must meet its communications needs, and the State should recognize that customers, not carriers, may consciously desire to exclude particular geographic

locations from particular rate structures. It should not be a violation of the law to fulfill a customer's desires.

Sprint, however, does agree with the State's position that AT&T's tariffs are not the repository of examples of permissible deviations from the geographic averaging requirement.[19] As the Commission is well aware, carriers other than AT&T have produced new and innovative pricing plans.[20] Sprint believes that the Commission can and should examine the pricing activities of other carriers as well in deciding what pricing practices are permissible under Section 254(g) of the Act.

Finally, Sprint disagrees with the State's argument that the Commission needs to define more narrowly the scope of its forbearance from the rate averaging requirement. The State contends that the Commission's decision to forbear "to the extent necessary" to allow carriers to offer contract tariffs, Tariff 12 offerings, optional calling plans, temporary promotions, and private line services is too vague.

The State argues that the Commission defines optional calling plans as involving discounts from basic rate schedules, that if basic rate schedules are averaged and if optional plans or contract tariffs offer geographically non-

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[19] State of Hawaii Petition at 8.

[20] Sprint's own "Fridays Free" and "Sprint Sense" plans are examples of such offerings.

discriminatory discounts off those schedules, those optional calling plans and contract tariffs will also be averaged. The State concludes that there is no need for forbearance in these instances.[21]

Sprint disagrees. Optional calling plans and contract tariffs, as the Commission recognized, offer discounts off of basic rate schedules in the sense that they provide the customer an opportunity to achieve savings from rates in other rate structures. Such contract tariffs and optional plans, however, are not necessarily simple percentage discounts off of existing geographically averaged rate schedules, as the State seems to assume.

In fact, the discounting process can be very complex. Sprint attaches as an example a currently effective page from its Tariff F.C.C. No. 12, Custom Network Service Arrangements (CNSA), illustrating how it calculates just one type of CNSA discount. There are other kinds of discounts as well. It is unwarranted for the State to argue that forbearance is unnecessary because of its erroneous assumption that the discounting process is a straight discount off of existing geographically averaged rate structures.[22] Adoption of the State's position would

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[21] State of Hawaii Petition at 10-11.

[22] In fn. 18 of its Petition, the State asks that the Commission "clarify" para. 25 of its Order because it could be read as "undermining carriers' requirements to offer optional call plans on a geographically nondiscriminatory basis." There is no need for such clarification, as the Commission said in para. 24 that "enforcement of the geographic

inhibit a carrier's ability to offer such discounts as are necessary to compete in the marketplace.

III. *IT&E Overseas, Inc.'s Petition for Reconsideration*

IT&E Overseas, Inc. ("IT&E") argues that the Commission appeared to require IT&E (and other carriers, such as Sprint) to integrate service between Guam and the Commonwealth of the Northern Marianas (CNMI) into the carriers' existing rate structures. Sprint shares IT&E's concerns that the high costs of providing service between Guam and the CNMI may inhibit the carriers' ability to immediately integrate these two points into those rate structures.

With respect to traffic between Guam and the CNMI, Sprint must currently backhaul such traffic approximately 7500 miles to the U.S. West Coast, switch it, and then send it back another 7500 miles to its intended destination, incurring high costs. Although the distance as the crow flies between Guam and the CNMI is approximately 120 miles, Sprint currently has no economic means of connecting Guam directly with the CNMI.

Although the Micronesian Telecommunications Corporation, the local exchange carrier in the CNMI, has

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rate-averaging requirements for contract tariffs, Tariff 12 offerings, *optional calling plans*, temporary promotions, and private line services is not necessary to ensure that charges, practices, and classifications are just and reasonable and not unjustly and reasonably discriminatory." (Emphasis supplied)

plans for a fiber optic cable between Guam and the CNMI, that cable has not even been laid, let alone placed into service.[23] Sprint explored the possibility of obtaining capacity on an existing microwave system between Guam and the CNMI that is owned and operated by MCI Telecommunications Corporation, but was told by MCI that there was insufficient capacity on the system to accommodate both Sprint's and MCI's needs. Sprint is currently exploring other alternatives.

Thus, there is no guarantee that Sprint, despite its best efforts, will be able to acquire and operate capacity that will enable it to operate between Guam and the CNMI on an efficient and economic basis. Sprint therefore concurs with IT&E's request that the Commission closely monitor the effect of rate integration. Sprint also asks that the Commission entertain any temporary waivers that may be required if Sprint is unable to fully implement rate integration between Guam and the CNMI in the manner originally contemplated by the Commission.

CONCLUSION

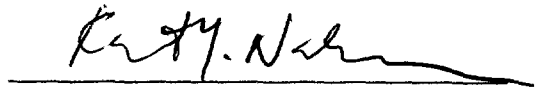
The Commission's Report and Order fails to afford sufficient flexibility to larger interexchange carriers to enable them to compete fully and fairly. The Commission

[23] Sprint had anticipated that this cable would be in operation long ago. However, the governments of Guam and the CNMI had an extended disagreement over who should provide the cable and on what terms, a disagreement that was resolved only very recently.

should exercise its forbearance powers to ensure that it does not distort the operation of free telecommunications markets that it is attempting to create.

Respectfully submitted,

SPRINT COMMUNICATIONS COMPANY, L.P.

By: 

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Dated: October 21, 1996

ATTACHMENT

CUSTOM NETWORK SERVICE ARRANGEMENTS

2.0 TERMS AND CONDITIONS (continued)

2.1 DEFINITIONS (continued)

Discounts (continued)

Type Three (3) Discount: An "in lieu of discount" is a discount that is a percentage of certain Service usage charges specified in the CNSA, calculated prior to the application of any other discounts. The resulting dollar amount is then reduced by the amount of any discounts available on the same Service usage during the same billing month. The difference, or the Type 3 Discount, is then added to the customer's standard tariff discounts and other discounts applicable to customer's Service.

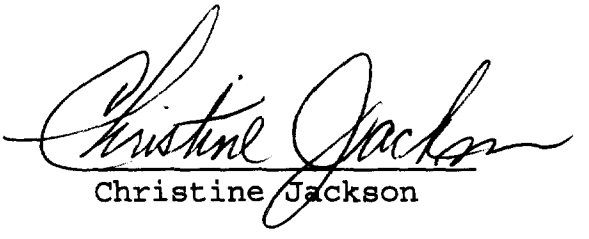
Example of a Type Three (3) Discount Calculation (30%):

Base service tariff rate	$ 0.2500
Minutes	1,000,000
Total (prior to all discounts)	$ 250,000
Base service tariff volume discount (20%)	$ 50,000
	$ 200,000
Base service tariff term discount (10%)	$ 20,000
Total tariff discounts ($50,000 + $20,000)	$ 70,000
Net of tariff discounts ($250,000 - $70,000)	$ 180,000
30% In Lieu of Discount ([$250,000 x .3] - $70,000)	$ 5,000
Net charges	$ 175,000

THIS EXAMPLE IS PROVIDED FOR ILLUSTRATIVE PURPOSES ONLY. THE RATES, DISCOUNTS AND CHARGES DEPICTED ARE NOT INTENDED TO BE REPRESENTATIVE OF ACTUAL RATES, DISCOUNTS OR CHARGES THAT A CUSTOMER MIGHT EXPECT TO RECEIVE.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **COMMENTS OF SPRINT ON PETITIONS FOR RECONSIDERATION** was sent by hand or by United States first-class mail, postage prepaid, on this the 21st day of October, 1996 to the people on the attached list.



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Attachment

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